No. 6

In the Supreme Court of the United States

OCTOBER TERM, 1939

INLAND WATERWAYS CORPORATION, UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE OF PANAMA CANAL, PETITIONERS

v.

CARY H. HARDEE, RECEIVER OF COMMERCIAL NATIONAL BANK OF WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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OPINION BELOW

The judgments of the District Court were entered without an opinion (R. 97–101). The opinion of the United States Court of Appeals for the District of Columbia (R. 106–121) is reported in 100 F. (2d) 678.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 31, 1938 (R. 121). The petition for a writ of certiorari was filed on January 31, 1939, and was granted on March 13, 1939 (R. 123). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Pursuant to various agreements with the Commercial National Bank deposits, secured by pledged collateral, were made in the accounts of the Secretary of War in behalf of the Canal Zone, the Inland Waterways Corporation, and the United States Shipping Board Merchant Fleet Corporation. After insolvency of the bank, the full amounts of these deposits with interest were paid, either by turning over the security or from the proceeds of such security. The receiver, assailing the validity of the agreements to give security, brought this suit to recover so much of the repayment of each deposit as exceeded the dividend paid general creditors. Three questions arise:

1. As to the Canal Zone deposit, is the United States an indispensable party defendant?

2. As to each petitioner, was the giving of security by the national bank invalid in the circumstances of this case?

3. A third question, which we do not urge as ground for reversal, relates to the Merchant Fleet

Corporation and the Inland Waterways Corporation. Did the bank hold their deposits as trustee *ex maleficio,* did the receiver take the assets of the bank subject to those trusts, and may the respondent, in the circumstances of this case, recover a money judgment against the petitioners?

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the separately printed Appendix to Nos. 5 and 6.

STATEMENT

This case is before this Court upon the pleadings, consisting of an amended bill of complaint. (R. 1–28); separate answers filed by the several petitioners;[1] motions by the respondent to strike certain defenses and for the entry of decrees *pro confesso* against the petitioners (R. 93–96); the judgments of the District Court, granting the motions (R. 97–101); and the judgment of the court below, affirming these judgments (R. 121).

The facts may be summarized as follows:

A. INLAND WATERWAYS CORPORATION[2]

On July 18, 1930, the Inland Waterways Corporation, an instrumentality of the United States (R.

[1] United States Shipping Board Merchant Fleet Corporation (R. 29–31), including exhibits; Inland Waterways Corporation (R. 73–80); Harry H. Woodring *et al.* (R. 82–92).

[2] The several petitioners were made defendants in the same complaint; it is deemed advisable, for the purpose of clarity, separately to set forth the facts relating to each.

79) created by the Act of June 3, 1924, for the purpose of administering the inland, canal, and coastwise waterway system of the United States (R. 77), opened a savings deposit account in the Commercial National Bank of Washington, D. C., a national banking association (R. 2–3). On March 5, 1931, the Corporation opened a checking account in the same bank (R. 3).

The bank agreed to safeguard the deposits, with securities subject to the order and control of the Corporation (R. 74). This arrangement was approved and required by the Secretary of War (R. 75).

On February 27, 1933, the bank closed its doors and suspended its operations. It was found and determined to be insolvent by the Comptroller of the Currency, and thereafter, on February 28, 1933, a receiver, predecessor of the respondent, was appointed (R. 3). At the time of the closing of the bank the credit balance in the savings account was $271,113.05, and the credit balance in the checking account was $211,543.52. The par value of the collateral securing the deposits was at that time $500,000 (R. 3).

Thereafter, on April 7, 1933, bonds of the par value of $245,000 were replaced by respondent's predecessor with cash (R. 74–75). On April 20, 1933, with the consent of respondent's predecessor, and the sanction and approval of the Comptroller of the Currency (R. 75), the corporation sold the

residue of the collateral for $261,215.63, and, on April 25, 1933, turned over to the respondent the sum of $21,804.16 as an adjustment and refund (R. 4).

On June 4, 1936, the receiver of the Commercial National Bank brought suit against this petitioner, together with the other petitioners, to recover that part of the proceeds which represented an amount in excess of the distributive dividends paid to general creditors. The complaint asserted, in substance, that the pledge of the securities by the bank was illegal; that the redemption of a portion of the bonds by the respondent's predecessor was made under a mistake of law and was illegal; that the sale of the remaining bonds by the Corporation was illegal; that, therefore, the bond or the proceeds became charged with a trust for the benefit of its depositors, creditors, and stockholders (R. 1–4); that the funds were not moneys of the United States nor a part of the revenues of the United States, and had not been covered into the Treasury of the United States; and, finally, that the Commercial National Bank had never been designated by the Secretary of the Treasury as a depositary of moneys of the Corporation (R. 11).

The petitioner answered separately, denying the specific allegations, and averred, insofar as material here, that the acts of all of the parties involved were in accordance with, and authorized by, administrative practice and custom known to and ap-

proved and sanctioned by the Comptroller of the Currency. It further averred that the United States was an indispensable party defendant and that if the bank had no authority to pledge the securities, it received and held the deposits as trustee *ex maleficio* for the benefit of the petitioner (R. 73–80).

B. UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION

On August 18, 1917, the United States Shipping Board Emergency Fleet Corporation opened a deposit account in the Commercial National Bank of Washington, D. C., a national banking association (R. 4). This account was closed on August 5, 1918 (R. 30). On December 1, 1921, an account was again opened with the bank. On June 14, 1923, written notice was given to the bank by the Corporation, that it was acting solely as the agent of the United States Shipping Board, that it had no beneficial interest in the account, and that the designation of the account should be changed to "United States Shipping Board Emergency Fleet Corporation, Agent, Deposit Account." The caption was subsequently changed again, to "United States Shipping Board Merchant Fleet Corporation, Agent, Deposit Account," to conform to the change in the petitioner's corporate name (R. 30). This account was opened pursuant to a resolution of the Board of Trustees of the petitioner, to the effect that in the interest of the United States, it was desirable to facilitate nego-

tiation of checks drawn on depositaries other than the Treasurer of the United States, and that therefore the treasurer of the petitioner was authorized to open an account with the bank, "a government depositary," the proceeds to be placed to the credit of the petitioner for immediate expenditure or transfer to the Treasury of the United States (R. 38).

On January 14, 1926, the petitioner opened another deposit account in the bank under the caption "United States Shipping Board Emergency Fleet Corporation, Agent, Good Faith Deposit Account" (R. 4, 30).

On November 19, 1931, the two parties entered into an agreement whereby the bank was to deliver to the corporation certain securities as collateral for the prompt payment on demand of all funds.[3] (R. 15–17). This agreement was the result of certain resolutions passed by the United States Shipping Board and the board of trustees of the corporation, reciting the statutory requirement that the Secretary of the Treasury should require all banks acting as financial agents of the Government to give satisfactory security for the safekeeping and prompt payment of public money deposited with them, and directing the treasurer of the corporation to require of each bank the deposit of securi-

[3] The letter from the bank, transmitting the securities (R. 70–71) authorized the corporation, on nonpayment of any of the deposits, to sell the securities, and to retain and apply the interest coupons. (See R. 15–17.)

ties as a condition for the continuance of deposits (R. 39–40).

At the time of the closing of the bank, on February 27, 1933, the credit balance in the "Agent, Deposit Account" was $264,302.16, and in the "Agent, Good Faith Deposit Account," $144,955.12 (R. 4, 30). The par value of the securities which had been pledged with the approval of the Comptroller (R. 16, 40, 41) was $400,000 (R. 5, 31).

On March 8, 1933, the treasurer of the corporation inquired of the Comptroller of the Currency whether the bonds might be liquidated (R. 31, 46–48). The Deputy Comptroller of the Currency, by letter dated March 17, 1933, authorized respondent's predecessor to advise the corporation that he, as receiver, would "interpose no objection to the sale of the securities," the proceeds to be applied in payment of the corporation's deposit claims.

Thereupon, the petitioner requested delivery of the bonds to the Treasurer of the United States for safekeeping and on April 4, 1933, the Treasury Department arranged for their disposal, and credited the proceeds of such disposal to the United States Treasury account of the petitioner's treasurer (R. 32, 50).

Certain bonds, of the par value of $275,000, were sold to respondent's predecessor for $281,695.31, paid to the corporation by him and deposited in the United States Treasury to the credit of the treas-

urer of the petitioner. The bonds were placed subject to the order of the Comptroller of the Currency for the benefit of the depositors of the bank. The remaining bonds were sold by the Federal Reserve Bank, the proceeds being deposited to the credit of the Treasurer of the United States for the account of the treasurer of the petitioner (R. 33–34, 55–57). Petitioner deposited with the Treasurer of the United States some matured interest coupons, and a check for the remainder of the matured coupons (R. 34, 57). All of these transactions were consummated with the express knowledge, consent, and approval of the respondent's predecessor and of the Comptroller of the Currency (R. 31, 34).

The sum of $4,270.17, representing the difference between the total proceeds of the disposal of the securities and the amounts on deposit in the bank, was paid by the petitioner to the respondent's predecessor on April 27, 1933 (R. 34, 57).

The complaint of respondent's predecessor (R. 5–6, 11) asserted the illegality of the pledge, and the right to recover so much of the proceeds as exceeded the distributive dividends paid to general creditors, in terms substantially similar to the allegations with respect to the Inland Waterways Corporation (*supra*, p. 5).

This petitioner answered separately, denying the specific allegations. It traced its history and outlined its statutory functions to show that it owned

no property, and controlled no money on deposit in any bank, except public funds appropriated by Congress, and funds received by the petitioner as public agent (R. 35–38; see discussion *infra*, pp. 49–50). By virtue of the Merchant Marine Act, 1920 (c. 250, 41 Stat. 988) petitioner, incorporated by the Shipping Board under the laws of the District of Columbia on April 16, 1917, was continued in existence for the purpose of the sale and operation of vessels owned by the United States, liquidation of Government property and the disbursement and collection of its public moneys. The moneys on deposit in the "Agent, Deposit Account" were wholly and exclusively public funds derived from the sale of Government vessels, revenues from the operation of Government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States which had come into the petitioner's custody as agent of the United States. Funds from this account were transferred from time to time from the bank to the Treasury of the United States, and there commingled with the public funds of the United States. The moneys on deposit in the "Agent, Good Faith Deposit Account" were wholly and exclusively suspense funds consisting of deposits for faithful performance of contracts and proposals by private bidders, and the only disbursements were in the form of returns of deposits to unsuccessful bidders, or as payments to

the Treasurer of the United States upon forfeiture of bidders' deposits or for crediting on the transaction for which the deposit was made. All such transfers, on information and belief, were received and accepted by the Treasurer of the United States as public funds of the United States [1] (R. 35–39).

The petitioner further averred that the pledge, known to, and approved by, the Department of the Treasury and by the Comptroller of the Currency, was in all respects legal (R. 42–43). It further alleged that all the proceeds of the sale of the bonds had been commingled with other public funds of the United States; that the petitioner possessed or controlled no property upon which a trust could be impressed; that the United States was an indispensable party to the suit, and that, if the bank had accepted the deposits without authority, it became a trustee *ex maleficio*, without title to any of the funds, so that the bonds were charged with the trust in favor of the respondent (R. 43–45).

C. THE SECRETARY OF WAR ET AL.

On May 1, 1911, the then Secretary of War opened a deposit savings account, carried under the caption "Government of Canal Zone," in the Commercial National Bank of Washington, D. C., a national banking association (R. 6). This account was opened pursuant to an agreement entered into

[1] In asking for a reduction of interest charges the bank referred to the petitioner's deposits as "public money deposits" (R. 68).

between the Secretary of War and the bank on May 11, 1910 (R. 17–21), whereby the bank deposited certain bonds with the General Purchasing Officer of the Isthmian Canal Commission, as security for the safekeeping and prompt payment of the moneys and funds deposited under the agreement. In the event of the bank's failure to carry out the agreement, the bonds were to become the property of the Secretary of War, subject to being retained or sold by him.[5]

On the date the bank closed, February 27, 1933, the balance in the account amounted to $711,622.92, composed almost entirely of money received by the Postal Service of the Canal Zone, consisting of deposit money-order funds and money-order funds (R. 84). The par value of the collateral deposited to secure the deposits was at that time $791,000.00 (R. 21).

On June 16, 1933, the Secretary of War directed the General Purchasing Officer of the Panama

[5] Other clauses of this contract recited that the Secretary of War acted as "the executive officer of the United States charged by the President with supervision and control over the governmental affairs of the Canal Zone," stated that the bank, in consideration of the benefits it would derive from the deposit, agreed to receive, keep safely, disburse, and account properly for all the moneys received; and provided that the contract should continue in force. In the event that Congress by law should "direct its termination or give instructions concerning the funds covered by this contract inconsistent with the terms hereof," the bank was to pay over immediately any balance remaining to the credit of the account.

Canal, pursuant to the provisions of the contract, to take over the bonds "as the absolute property of the Canal Zone," and authorized him to enter into an agreement with the receiver of the bank, subject to the approval of the Comptroller of the Currency, concerning the market value[6] at which the bonds were to be taken over (R. 7, 21–22). The receiver consented to the taking over of the bonds (R. 7).

The complaint of respondent's predecessor (R. 6–7, 11), in addition to the general facts contained in the foregoing statement, averred that the several defendants were being sued both in their individual and personal capacities (R. 3) and alleged the illegality of the pledge of securities by the bank and the right to recover that part of the bonds or, if they had been sold, of the proceeds of the sale, which represented an amount in excess of distributive dividends paid to general creditors, in terms substantially similar to the allegations with respect to the Inland Waterways Corporation (*supra*, p. 5).

The prayer for relief sought to compel the petitioners "as Secretary of War and as General Purchasing Officer and Chief of Washington Office,

[6]While the record is silent in this respect, the agreed market value was $690,223.75, as of June 15, 1933, leaving a balance due to the Canal Zone fund of $21,399.16. While these are matters which would have been developed had a trial on the merits been had, it is believed that this information might be of interest to the Court.

respectively," to account for the bonds or the proceeds of their sale (R. 13).

The petitioners in their answer averred that they were parties in their official capacities only, by substitution for their predecessors in office. Reviewing the statutes and regulations relating to the Canal Zone (R. 84–85), petitioners asserted that the making of the contract for the deposit and delivery of securities was within the lawful authority of the Secretary of War (R. 84); that the action of the Secretary in entering into the contract and receiving the securities was recommended and approved by the Secretary of the Treasury and the Comptroller of the Currency; and that it was in compliance with a practice and custom of twenty years' standing approved and sanctioned by the Comptroller of the Currency, and acquiesced in by Congress (R. 85–86, 90).

The petitioners further alleged that the United States was the real party in interest, and an indispensable party to the suit.

The respondent's motions to strike out certain parts of each answer and for the entry of a decree *pro confesso* against each defendant were granted, and judgments were entered against the petitioners (R. 97–98, 99–100, 100–101). On appeal, the Court of Appeals for the District of Columbia affirmed the judgments.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

In respect of the Inland Waterways Corporation

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation which is an instrumentality of the United States created by an Act of Congress to perform functions formerly entrusted to the Secretary of War.

2. In failing to hold that the money in question was public money of the United States.

3. In affirming the judgment against the petitioners.

In respect of the United States Shipping Board Merchant Fleet Corporation

4. In holding that a national bank could not lawfully pledge its assets to secure a deposit made by a corporation which is an instrumentality of the United States created by an Act of Congress to perform functions of a public character.

5. In failing to hold that the moneys in question were public moneys of the United States.

6. In failing to hold that the bank became a trustee *ex maleficio* in respect of the funds here involved.

7. In affirming the judgment against the petitioners.

In respect of Harry H. Woodring, Secretary of War, and H. A. A. Smith (Canal Zone Deposits)

8. In holding that a national bank could not lawfully pledge its assets to secure a deposit account which was made up almost entirely of deposit money order accounts and postal money order accounts of the Panama Canal.

9. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

10. In failing to hold that the laws applicable to postal money order accounts in the United States were applicable to the postal accounts of the Canal Zone.

11. In failing to hold that the moneys in question were public moneys of the United States.

12. In failing to hold that the United States is an indispensable party to this suit.

13. In affirming the judgment against the petitioners.

SUMMARY OF ARGUMENT

I

Two cardinal factors demonstrate the validity of the pledges in the instant case: the pledges covered deposits made by government instrumentalities, and the pledges themselves were made by a government instrumentality, a national bank.

1. Historically, the taking of security for the deposit of governmental funds in ordinary banks was integrated into our fiscal policy. Deposits with the first and second bank of the United States caused the Government no loss. Between 1811 and 1817 deposits were made in private state banks without any provision for collateral security and heavy losses resulted. Deposits in similar banks between 1833 and 1837 likewise were disadvantageous to the Government. When Secretary Taney withdrew moneys from the Bank of United States in 1833 he deposited them in state banks under contracts calling for the giving of security. This provision was incorporated in an 1836 statute. In 1841, after the repeal of a year-old subtreasury act, the Secretary of the Treasury, without statutory direction, deposited governmental moneys in state banks under contracts calling for security. This continued until the subtreasury Act of 1846. Thus, in order to protect deposits of public funds, there gradually evolved a system requiring a pledge of assets by depository banks or the retention of all public moneys in subtreasuries.

2. National banks were created for the purpose of serving public needs. While insuring a sound currency and furnishing a ready market for governmental securities, their functions as fiscal agents and depositories for public funds of the United

States were also important elements which led to the creation of the banks.

National banks have two aspects, namely, that of private banking corporations and also that of governmental instrumentalities. It was the private aspect of national banks which was considered by this Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, and the rule of equality of treatment of depositors was held to govern. A different rule should apply where a national bank, an instrumentality of the Federal Government, secures the public funds of that government.

The development and use of governmental instrumentalities and agencies have carried over to such agencies the authority and power to demand a pledge of assets to secure public moneys. Congress has been made aware of this practice at least insofar as the Secretary of War is concerned, and could not have intended that federal agencies, in order to fulfill their duty safely to keep the public funds, should be compelled to resort to state banks which ordinarily may pledge their assets to secure deposits.

Other statutes, as well as Section 5153, requiring certain officials to exact a pledge to secure deposits, do not negate an underlying power in national banks to secure federal public funds. Their provisions are mandatory and do not contradict the implied permisive powers of other officials. There

is no reason to believe that Congress did not intend to protect all federal public funds.

3. The administrative interpretation of the Act accords with this view. For over sixty years the Secretaries of the Treasury and Comptrollers of the Currency have authorized and approved the action of the national banks in pledging their assets to secure public funds. An administrative construction of such length is entitled to greatest consideration. Certainly the Act here under consideration is not free from doubt, and the rule of *United States* v. *Midwest Oil Co.*, 236 U. S. 459, should apply: where there is a long-continued administrative practice, great weight should be given to the practice itself in determining its authority.

4. The nature and character of the funds deposited in the instant case disclose their governmental character.

The Inland Waterways Corporation was formed to carry out the announced policy of Congress relating to the development and operation of the Inland and Coastwise Waterways. It performed a function formerly entrusted to the Secretary of War and still continues to operate under his supervision and control. Its entire funds consist either of capital entirely subscribed by the United States or of receipts from earnings made by it with equipment and property transferred to it by the United States.

The United States Shipping Board Merchant Fleet Corporation was created by the United States Shipping Board, a department of the Government, to carry out important governmental functions relating to shipping. All of the capital stock of the corporation was subscribed for by the United States and after that capital was expended, huge sums appropriated by Congress to be disbursed by it. By statute all of its property and assets have been transferred to the United States and it serves only as an agent, having no property of its own.

Both corporations deal with governmental moneys exclusively. The properties of corporations of this character have not lost their public character because the Government chose to have legal title taken in the name of the corporation. While the petitioners are free from strict Treasury regulations, the funds handled by them are none the less public funds.

5. Aside from other considerations, in view of the personal participation by the Secretary of the Treasury in effecting the pledge of assets to secure the Panama Canal funds, it would seem that that pledge was effected in substantial compliance with Section 5153. A former Secretary of the Treasury, consulted by a predecessor of the petitioner Woodring, advised and assisted in the making of the deposit and the exaction of security, not only that involved in this case but also that involved in the companion case of *Woodring* v. *Wardell*, No. 5, this Term.

II

It was argued below if the pledges were invalid, the deposits likew were invalid, and the bank became a trustee *ex maleficio* for the deposits of the Inland Waterways Corporation and the Fleet Corporation. The funds involved were governmental moneys and if the petitioners were required to deposit such moneys either in the Treasury of the United States or in a designated depository, then the deposit was illegal. However, we do not believe that the Inland Waterways Corporation should have deposited the funds in the Treasury; and the illegality of the Fleet Corporation deposit has been cured by Congress.

If, however, we are wrong and the deposits, or either of them, were illegal, then under well-accepted principles the bank acquired no title to the funds and held them as a trustee *ex maleficio*. It is well settled that where a receiver of a national bank takes over the assets of a bank, he takes them subject to any trust then existing. It is only necessary that the trust be established and that the funds be traced into the hands of the receiver. On the assumption of illegality, an opportunity should be afforded petitioners to trace the trust funds into the hands of the receiver.

The fact that the receiver may not have sufficient funds in his hands at the present time to satisfy the trust would constitute no defense. His payment to the petitioners of the amount of their de-

posits from the proceeds of the bonds was a substantial discharge and satisfaction of the trust; or, viewed from another aspect, the mutual agreement between the parties substituted the pledged bonds for the unextinguished trust and thereby discharged the mutual claims of one against the other.

Finally, if the receiver had in his possession adequate assets to have discharged the trust, but has dissipated the same through the payment of dividends to the creditors, he has been guilty of conversion and may not now maintain the instant action.

III

In any event, the pledge of the assets to secure Canal Zone deposits was valid under established Canal Zone practice and ratifying acts of Congress; moreover, the action should be reversed against the petitioners Woodring and Smith because the United States is a necessary party to the suit, as developed in our brief in *Woodring* v. *Wardell*, No. 5, this Term.

ARGUMENT

I

The Pledge by the Bank of Its Assets to Secure the Deposits of Government Moneys Made by the Petitioners in the Present Case Was Valid

In asserting that the pledges made in the present case were valid, we call attention to two cardinal elements of the situation presented by this case.

The pledges were made to secure deposits of governmental moneys made by the petitioners in their capacity as agents and instrumentalities of the United States. And the pledge of its assets was made by a national bank—an institution whose existence is constitutional only because it is an instrumentality of the United States.[7] The assertion that the pledges made were invalid disregards this relationship between the national banks and the United States.

1. *The Fiscal Background of the National Banking Act*

The history of the deposits of governmental moneys prior to the National Banking Act of 1864 supports the view that the national banks have authority to pledge their assets to secure deposits such as those made by petitioners. That history shows that, after an early, bitter experience with unsecured deposits of public moneys, the importance of obtaining security for deposits of governmental funds was recognized and was integrated into our fiscal policy.

Prior to the adoption of the Constitution, and under the Articles of Confederation, such moneys as were possessed by the Confederation were deposited in private banks.[8] In its preamble the Act

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[7] *McCulloch* v. *Maryland*, 4 Wheat. 316, 424; *Farmers', etc., Nat'l Bank* v. *Dearing*, 91 U. S. 29, 33; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 209, 211.

[8] *John Burton Phillips*, Methods of Keeping the Public Moneys of the United States, p. 1; Pub. of Mich. Political

of February 25, 1791, establishing the first Bank of the United States (c. 10, 1 Stat. 191), set forth that the formation of the bank "will be very conducive to the successful conducting of the national finances". The major portion of the deposits of public money was made with that bank, although state banks were employed to some extent.[9]

Between 1811 and 1817, after the expiration of the charter of the Bank of the United States, the Federal Government deposited its money in state banks. The arrangements during that period of time which were entered into by the United States and the banks disclose a complete absence of any requirement for the banks to furnish security for the keeping of public moneys. Phillips states, p. 16:

> It seems that the Government was in the same position as a private citizen in that respect, and this argues an unlimited amount of confidence on the part of the Secretary and officials in the stability of the banks. Later history showed this confidence to have been clearly misplaced and the resulting losses severe. After the Government began

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Science Association, Vol. IV, No. 3, Dec. 1900. No legislation respecting the deposit of such public moneys was enacted prior to the Act of March 3, 1809, c. 28, 2 Stat. 535, 536, which provided that disbursing officers should keep their funds in some incorporated bank designated by the President.

[9] *Phillips, supra*, pp. 7, 9; *American State Papers*, Finance, Vol. 1, p. 691; *Bolles*, Financial History of the United States, 1789–1860, pp. 18–19.

requiring collateral security of the deposit banks, its losses from this source were only nominal.

As a result of financial conditions arising during the War of 1812, the banks suspended payment in specie. The entire deposit arrangement proved most unsatisfactory, resulting in the Government's being embarrassed for lack of funds.[10] It has been estimated that as a result of this brief experience, when the Government "was in the same position as a private citizen," the Government lost approximately 46 million dollars through its deposits with state banks. House Report (Committee on Ways and Means) No. 358, 21st Cong., 1st Sess., Vol. 3, p. 12.

In 1816 the second Bank of the United States was chartered, and with it were placed practically all deposits of public moneys of the United States. A few state banks, however, were used as depositaries. Phillips, p. 45. No losses were suffered by the United States as the result of its deposits in the second Bank. *Phillips*, pp. 47, 50, 52.

The second Bank of the United States, however, was not beyond reproof in other respects, and the question of an extension of its charter became a major political issue. In 1833, Taney, the then Secretary of the Treasury, under statutory authority, withdrew the deposits of governmental moneys from the second Bank. He stated that the bank

[10] *Babcock*, The Rise of American Nationality, Vol. IV, pp. 219, 220.

had admittedly been "incorporated in order to create an useful and convenient public agent to assist the Government in its fiscal operations," and that, like every other public agent or officer, its own separate interests should be subordinate to its duty to the public. Sen. Doc. No. 2, 23d Cong., 1st Sess. (Ser. No. 238), p. 11.

Taney advised the Senate that he had placed deposits of public moneys with state banks under contracts whereby, should the banks obtain deposits of public moneys in excess of one-half of their paid-in capital, security for such deposits would be required. In addition, the Government reserved the right to demand security whenever it was thought advisable.[11] The deposits were continued by Taney, and his successors, in state banks, and the second Bank of the United States was allowed to expire by the terms of its charter in 1836.

By the Act of June 23, 1836, c. 115, 5 Stat. 52, Congress required the Secretary of the Treasury to select as depositaries of money of the United States, banks incorporated by the several states, by Congress for the District of Columbia, or by the territories. Section 6 provided that it should be the duty of the Secretary of the Treasury, whenever in his judgment the same should be necessary and proper, to require of any bank so selected, col-

[11] *Kinley*, The Independent Treasury, p. 17. A typical agreement, the one between the Treasury and the Girard Bank of Philadelphia, is set out in Phillips, at pp. 54–55.

lateral or additional securities for the safekeeping of the public moneys. As a consequence of this Act, between June and December, 1836, the number of depositaries was increased from thirty-three to eighty-one. Collateral security was required and obtained of all save a very few of these. *Phillips, supra*, p. 63.

Under another provision of the Act of June 23, 1836, c. 115, 5 Stat. 55, all surplus in the Treasury in excess of $5,000,000 was directed to be deposited with the "Treasurers, and other competent authorities" of the several states. The sudden withdrawal of this surplus money from deposit banks, coupled with certain economic conditions, brought on the panic of 1837. *Dewey*, Financial History of the United States, 12th Ed., pp. 229–231. In the panic of 1837, eighty-four of the eighty-eight deposit banks suspended payment of specie, and again the Government was unable to meet its obligations. *Channing*, Vol. 5, p. 460. Phillips states (pp. 80, 85, 86) that the Government's embarrassment did not lie wholly in its failure to secure the public money then in the deposit banks, but that there had been an error in the estimate of the revenues for 1837. Senate Document No. 2, 25th Cong., 1st sess.

Thereafter, the major portion of the receipts of the Government was retained by the various collectors and by the Treasury. Phillips, pp. 87, 88, 102. The first subtreasury act, passed July 4, 1840, c. 41, 5 Stat. 385, was repealed, after a year, by the

incoming Whig administration. At the same time the Act of June 23, 1836, was repealed. The Whigs did not enact expected legislation which would have created a third bank of the United States. *Phillips*, pp. 111, 112; *Channing*, Vol. 5, pp. 464, 465. Again the deposits of public moneys of the United States were made in the manner directed by the Secretary of the Treasury and the President.

In 1841, Secretary Ewing selected state banks as depositaries and entered into agreements with them whereby each bank agreed to give collateral security if the public deposits exceeded one-half of its paid-up capital, or whenever the Secretary required it.[12] This provision was substantially the same as that contained in Taney's agreements with the depositaries made in 1833. These agreements remained in effect until 1846, when the second subtreasury act was passed, practically eliminating deposits of public moneys with banks.[13] This system continued in effect without substantial change until 1863, when there was enacted the first of the National Currency Acts creating national banks.

In summary, it is evident that, during the peri-

[12] Ex. Docs. No. 123, 27th Cong., 2d Sess., p. 2. A copy of the agreement is set out in Phillips at p. 113.

[13] This Act required all moneys of the United States to be deposited either in the Treasury of the United States or in certain designated subtreasuries. Sec. 16 of the Act made the loan or deposit of public money by an officer or agent of the United States a statutory crime of embezzlement provided the deposit was not made as provided by law. Act of August 6, 1846, c. 90, 9 Stat. 59.

ods when the Government was depositing its moneys generally in banking institutions, a fiscal policy had been evolved which required the banks to agree to give security to safeguard the deposits. This was not true during the period between 1811 and 1817, and grave losses resulted. When Secretary Taney withdrew the deposits from the second Bank of the United States in 1833, he required the state bank depositaries to agree to give security. This provision was retained in the 1836 legislation, which remained in effect until 1840. In 1841 Secretary Ewing, left without statutory command, again entered into contracts containing provisions agreeing to the giving of security, and those contracts continued until the second subtreasury system of 1846. The exaction of security was doubtless in part responsive to the dissatisfaction with political and personal considerations which had motivated deposits of public funds in certain local banks. But the all-important consideration was the integrity of the public moneys.

2. Government Deposits Under the National Banking Act

The history of deposits of public moneys, part of which has been traced, illumines the scope of the Act of June 3, 1864 (c. 106, 13 Stat. 99, 113), creating national banks. They were created "in order to provide a uniform and secure currency for the people, and to facilitate the operations of the

Treasury of the United States." *Mercantile Bank v. New York,* 121 U. S. 138, 154. Several objectives were sought in the Act. The primary purpose was to secure national uniformity in the issue of currency (Cong. Globe, 38th Cong., 1st Sess., p. 2125). It was desired to have banks under federal charter purchase government bonds and issue currency based upon such bonds. Interrelated with the other ends of the Act was the provision for the deposit of public moneys in the national banking associations.[14]

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[14] In an article entitled "The Origin of the National Banking System" by Andrew MacFarland Davis, printed as Senate Document 582, 61st Congress, 2d Session, and reprinted in Volume 5 of the publications of the National Monetary Commission, the need which obtained at the time of the passage of these Acts for a uniform, dependable national currency and a national banking system is described. The motives which impelled this legislation are given as follows at page 106 of Vol. 5 of the publications of the Commission:

"The various reports of the Secretary, his speeches, his correspondence, the discussions in Congress, the newspaper articles, and the contributions to magazines all agree that the following were the benefits to be derived from the passage of the bills: A uniform currency controllable in amount by the General Government, and receivable for taxes by the Treasury; a market for a large block of government securities, * * * the creation of a large number of institutions under national control widely distributed over the country, *which could not only serve as depositories for government funds, and thus relieve the collectors of internal revenue and other government officials having custody of such funds from the anomalous situation in which they were placed under the existing law,* but which could also act as the fiscal agents of the Treasury, and could receive subscriptions to loans and distribute bonds to subscribers; and, finally, the stimulation

The Act created the banking associations as instrumentalities of the Government, in the conduct of its affairs, intended to subserve public purposes and not private interests. *Bank* v. *Lanier*, 11 Wall. 369, 374; *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 394; *Christopher* v. *Norvell*, 201 U. S. 216, 225. Indeed, the constitutionality of the Act of 1864 has been unquestioned, and has been supported on the authority of *McCulloch* v. *Maryland* (4 Wheat. 316), precisely because the national banks "are instruments designed to be used to aid the government in the administration of an important branch of the public service." *Farmers', etc., Nat. Bank* v. *Dearing*, 91 U. S. 29, 33.

In discarding a strict subtreasury system and in providing for the deposit of public moneys in privately owned banks, Congress did not reject, but rather gave its approval to the fiscal policy evolved in the 1830's and 1840's of safeguarding such deposits by the taking of security. The debates indicate an awareness that an indiscriminate deposit of public moneys with unsecured banks was to be avoided in order to protect the fiscal integrity of the United States.[15] Section 45 of the Act (R. S.

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of the patriotism of the people * * *." [Italics supplied.]

The deposit of public money in private banks has ordinarily been eagerly sought. Phillips, pp. 59–75. See debates on Senate Bill 5876, 45 Cong. Rec. 1324 *et seq.* Cf. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, note 13, p. 258.

[15] See Cong. Globe, 37th Cong., 3d Sess., Pt. I, pp. 843, 844.

Sec. 5153, 12 U. S. C., sec. 90) authorized the Secretary of the Treasury to designate certain national banks to be depositaries of public moneys and required him to procure a pledge of assets to insure the safekeeping and prompt payment of the public moneys deposited with them.

Since the national banks were established as instrumentalities to aid the government of the United States, it seems plain that their powers to render such assistance should not be narrowly confined. In Section 45 Congress made it "the *duty* of the Secretary of the Treasury to require them to give satisfactory security" for the Treasury funds deposited by him (*Cook County Nat. Bank* v. *United States,* 107 U. S. 445, 449). [Italics added.] This in no wise indicates that Congress intended to deny other officers in control of governmental funds the *power* to obtain such security in the best interests of the Government. Congress did not intend that the principle of security for governmental deposits, evolved in the past as a wise fiscal policy and given vigorous approval by Section 45 itself, should be confined solely to deposits made by the Secretary of the Treasury under Section 45.

National banks have two aspects: They were created primarily to perform a governmental function, to enable the government better to discharge its fiscal and credit obligations. At the same time it was conceived that an instrumentality taking the form of an ordinary private or state banking insti-

tution would best serve the government. The sub-Treasury system was inflexible. It was not possible through it to secure the end of uniform currency, adequate distribution of governmental securities and safe-keeping of certain types of government moneys. The Bank of the United States had become a major political issue and the state banks were thoroughly distrusted.

If these two aspects of national banks are kept sharply in mind, namely: the function as a government instrumentality on the one hand and on the other the activities of an ordinary banking institution, the decisions in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, and *Marion* v. *Sneeden*, 291 U. S. 262, will be seen as not reaching the issue which is presented in the instant case. Those cases were decided not upon the basis of specific statutory language precluding a pledge of assets, but rather upon a consideration of the purposes of Congress in creating national banks. Cf. *McNair* v. *Knott*, 302 U. S. 369, 371.

Private funds were involved in the *Pottorff* case; municipal funds, which from the point of view of the federal financial institutions are in the same category, were involved in the *Sneeden* case. Therefore, only those policies of the Congress relating to the private banking functions of the national banks were drawn in question in the *Pottorff* and the *Sneeden* cases. From this view, the primary policy of the National Banking Act is, of course,

the equality of treatment of depositors. This is not a matter of policy merely in relation to national banks, it is a traditional policy in respect of banking institutions generally. It was for this reason that this Court in reaching its conclusion that securing deposits was illegal was able to draw on the literature relating to ordinary banking practice.

In the present case, however, federal funds are involved. The issue is what are the powers of the national banks in the discharge of their functions as governmental instrumentalities, not as private banking institutions. In this connection, clearly enough, the primary policy of Congress cannot be equality of treatment. The entire fiscal history of the national government is studded with evidence of an entirely contrary policy, that is, the policy of the Congress to see above all that the funds of the United States are secure and readily available in time of need. While the primary policy of Congress may be the policy of equality of treatment in respect of private funds, including the funds of other governments within the United States, where the national bank is viewed as a government instrumentality the primary policy is one of security, availability, facility of handling for the national funds.

In the *Sneeden* case, even though the pledge of assets to secure deposits of public moneys of states or their political subdivisions may have been a common practice, the Court was apparently unwill-

ing to impute an intent on the part of Congress to permit national banks to pledge assets to secure these funds where the state itself was unwilling to confer like authority on banks which it had created. This reluctance cannot be present when the funds are those of the federal government itself.

There is no basis for suggesting that the policy of securing federal funds approved by and made compulsory in Section 45 was limited to deposits made by or pledges taken by the Secretary of the Treasury. Congress did not intend to strait jacket its handling of federal funds under pain of denial of the protection of security. The national banks were created as instrumentalities responsive to the needs of the governmental agencies. The Canal Zone officials charged with the safekeeping of a postal fund of $700,000 cannot be thought to have departed from Congressional policy by depositing the moneys in a national bank under an agreement to give security for their deposit. Likewise, the corporations involved in this case were utilized as a convenient machinery to secure to the Federal Government the advantage of greater flexibility resulting from their freedom of strict accountability to forms and procedures of the regular Government establishments, and it was not intended that the Government should be jeopardized by its own machinery, or that it should unnecessarily sacrifice advantages which it enjoyed when functioning through other machinery. *Emergency Fleet Corp.*

v. *Western Union*, 275 U. S. 415; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *Clallam County* v. *United States*, 263 U. S. 341; *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106.

National banks have powers "necessary to carry on the business of banking * * * by receiving deposits" (Sec. 8). The deposit of the funds of a government which believes in the securing of its funds carries with it the incident of security for the deposit. Insofar as Section 45 authorizes the bank to give security for public moneys, the authority betokens a statutory policy which extends to this case. See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381. The frequent development of governmental enterprise into forms which put the governmental moneys under the control of officials other than the Secretary of the Treasury carries over to such officials the responsibility of safeguarding of deposits by the taking of security. The distinction that the Secretary of the Treasury would be *required* to take security does not avoid the *power* of others in charge of Government moneys. Possibly Congress has been reluctant to extend to corporate agencies hard and fast rules as to how they should keep their moneys. This reluctance is not to be construed as a denial of power effectively to safeguard the funds of the United States.

Congress was made aware of the taking of security by the Secretary of War in reports made to it between 1910 and 1920. This procedure was never

subjected to criticism, and was, indeed, confirmed by the Act of 1916. See Brief for Petitioners, No. 5, this Term, pp. 34–37. It was undoubtedly expected and anticipated by Congress that the other agencies which it soon after created to handle government funds free of Treasury control might likewise have the funds secured if thought desirable.

Should respondent's contention be correct, we would have presented an incongruous situation. Agencies and instrumentalities of the Government, simply because they were freed from Treasury control, would in the interest of security of their funds be compelled to deposit such funds either in state banks or private banking institutions, which ordinarily are taken to have the power to pledge assets to secure deposits of public moneys.[16] We do not think that Congress intended such a result. In the recent case of *Berger* v. *Chase National Bank*, decided July 24, 1939, the Circuit Court of Appeals for the Second Circuit, in discussing a similar situation in respect of deposits of the Philippine Islands said:

> We are brought therefore to the inquiry whether this legislation can be considered properly a regulation of the affairs of the territory, as distinguished from those of the country at large, and whether it violates any specific legislation or legislative policy of the Congress. As to the latter, it is quite

[16] See 42 Harv. Law Rev. 272; 79 Univ. of Pennsylvania Law Rev. 68.

clear from the several instances cited above where pledges by national banks have been authorized that it does not. Indeed, an opposite result would be definitely out of line with a well-recognized policy, for it would give the state banks a monopoly upon Philippine deposits in this country, contrary to the established policy of placing the national banks on a competitive equality with state banks. *McNair* v. *Knott, supra.* Indeed it would go still further and prefer the local banks in the Philippines to the branches of the national banks there, for the legislation in question is surely valid so far as it designates depositaries in the Islands themselves.

The administrative practice in connection with the taking of security will be discussed below, pp. 40–46. But it is meet to note at this point that the giving of security for deposits of federal agencies does not offend against banking practice, or a sense of banking propriety, as was the situation in the *Pottorff* case. *Willis, Chapman, and Robey,* Contemporary Banking, pp. 110, 336. And in England, at least some public bodies customarily obtain security for their deposits without specific statutory approval. *Walter Bagehot,* Lombard Street (14th ed. 1927), pp. 101–102.

Respondent may rely upon the fact that in certain statutes Congress has made specific provision for security safeguarding certain funds. See Section 61 of the Bankruptcy Act, c. 541, 30 Stat. 562, Section 9 of the Postal Savings Act, c. 386, 36 Stat.

816, the Acts relating to Indian moneys, c. 86, 40 Stat. 591, to Insolvent Bank funds, c. 121, 39 Stat. 121, to Porto Rican funds, c. 145, 39 Stat. 954, 956, and to Government Obligations, c. 56, 40 Stat. 291.[17] These statutes, like Section 45 of the National Bank Act of 1864 (see *supra*, p. 31), are not permissive but mandatory in respect of the requirement of security. The word *shall*, and not *may*, *is* used. The Acts are entirely consonant with an underlying power on the part of the banks to pledge their assets to secure federal public moneys. Indeed, these statutes rather reenforce the proposition conceding power in the national banks to safeguard deposits of funds belonging to the United States. Except for the statute relating to the proceeds of government loans (which also authorized deposit in and taking security from state banks), each deals with moneys in which the United States has no beneficial interest. It would seem anomalous to urge that the Government should be indifferent as to the security of its property handled through corporate entities, or other

[17] These statutes direct officers to require a pledge of assets, without a corresponding grant of power to the national banks to pledge such assets. In the *Pottorff* case this Court suggested that Congress intended to make valid every pledge called for by statute. For reasons of public policy it might likewise be urged that Congress intended every pledge to be valid where the nature of the duty performed by an agent or instrumentality seems to indicate the necessity for such pledge. The cases at bar are apt illustrations of the necessity of securing deposits of public moneys so as to preclude the possibility of an ultimate loss to the Government.

agents not required to deposit funds in the Treasury, while at the same time it shows deep concern over other funds in which the United States possesses no substantial beneficial interest.

3. The Consistent Administrative Practice

The administrative interpretation of the Act accords with this view. Beginning in 1910, a predecessor of the petitioner, Woodring, upon the advice of and with the knowledge and consent of the Secretary of the Treasury, opened an account with the Commercial National Bank for the deposit of Canal Zone funds.[18] He obtained the pledge of assets by the bank to secure the deposit. This fact was well known to succeeding Secretaries of the Treasury and Comptrollers of the Currency. It was likewise known to Congress. No question regarding the propriety of this procedure was raised before the instant case and the companion case of *Woodring et al.* v. *Wardell*, No. 5, this Term. In addition to the instances of deposits of Canal Zone funds, funds of the Inland Waterways Corporation and the moneys handled by the Fleet Corporation, deposits were made of funds by the Alien Property Custodians and of the funds of the Philippine Islands, under pledge agreements substantially similar to

[18] The letters from Lt. Col. Goethals to Secretary of War Wright during 1908 (Appendix, pp. 51–52) refer to similar existing deposit arrangements between the International Banking Company and the War Department covering the deposit of Philippine funds.

those here considered. Such deposits were made not only with the Commercial National Bank, but also with a number of other national and state banks.[19] We have been unable authoritatively to list all instances where instrumentalities and agents of the Federal Government entered into arrangements similar to those here involved,[20] but it seems clear that had any such instrumentality or agent desired to make substantially similar banking arrangements, they would have been administratively approved, at least prior to the decisions in the *Pottorff* and *Sneeden* cases. It was not doubted by the Comptrollers of the Currency and their staffs that national banks had such authority.

With a letter of April 27, 1934, addressed to the President of the United States Senate by the Secretary of the Treasury, there was inclosed a memorandum advising an amendment to Section 5153 of

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[19] We are advised that the Inland Waterways Corporation had secured deposits with six national and four state banks. Funds of the Philippine Islands were deposited with 45 national and 20 state banks. *Berger* v. *Chase National Bank*, *supra*, p. 37. Funds of the Fleet Corporation were deposited in 80 or 90 banks over the world, 69 Cong. Rec. 1959.

[20] However, in an effort to determine administrative practice in this respect, we have been advised that similar deposits have been made in national banks by a number of corporate agencies or instrumentalities, which deposits were secured by a pledge of assets. These include the Panama Railroad, the United States Housing Corporation, the United States Spruce Production Corporation, the American Red Cross, the Bureau of Prisons of the Department of Justice, the Veterans' Administration, and at least one Home Loan Bank.

the Revised Statutes. Senate Document No. 175, 73rd Congress, 2d Session. The Secretary of the Treasury pointed out to Congress the long continued administrative construction which had prevailed, and urged Congress to enact clarifying legislation, permitting the taking of security to safeguard deposits of public moneys of the United States made by government officials and agencies generally.[21] In the memorandum, which is deemed significant enough to be set out at length, it is stated:

> Attached hereto is text of proposed amendment to Section 5153 of the Revised Statutes, as amended (U. S. C., Title 12, sec. 90), which amendment relates to the designation of depositaries of public money by the Secretary of the Treasury and the giving of security by national banking associations for deposits of public money of the United States and for various other types of deposits made by public officials, consisting of money for which they are accountable under the law by virtue of their official capacity. The essential respects in which this amendment changes the present law is in that *it*

[21] No action was taken in Congress with respect to this proposal other than the introduction, on May 7, 1934, of a bill, S. 3558, which was never reported out by the Committee on Banking and Currency. There is no explanation of this inaction, but it seems more probable that Congress thought the Secretary's fears unjustified than that it thought the security for deposits undesirable. Compare *McNair* v. *Knott*, *supra*, 371–372.

eliminates doubt under recent decisions as to the power of national banks to give security for the protection of deposits of public money belonging to various Government agencies or of money deposited thereby where they are accountable for such money by reason of the official capacity in which held.

* * * * *

There is urgent necessity for the prompt enactment of this legislation, due to recent decisions of the Supreme Court of the United States, particularly two decisions rendered February 5, 1934, in *City of Marion, Illinois,* v. *Sneeden, Receiver* and *Texas and Pacific Railway Company* v. *Pottorff, Receiver,* in which *the Court took the position that national banks have no implied power to give security for deposits of public money, notwithstanding the fact that for more than 60 years national banks have been giving such security with the approval of the Comptroller of the Currency,* in conformance to the views expressed by the Attorney General of the United States (in 30 Ops. Atty. Gen. 341), to the effect that the section being amended "is more reasonably construed as a recognition of the existence of the power on the part of national banks to give security for deposits than as a grant by implication or authority to give security for Government deposits alone." *A large number of national banks have been placed*

in the hands of receivers in the past 3 years. Almost all of these banks held deposits of public money for which security had been pledged. Millions of dollars in such deposits belonging to the Philippine Islands, the United States Shipping Board, Emergency Fleet Corporation, United States Housing Corporation, and similar entities were on deposit in these banks under a contract, whereby the bank had pledged collateral security therefor. *These pledges were considered valid by this office* and these agencies permitted to avoid loss of such deposits through realization upon the collateral held. Unless curative legislation is enacted to cover this situation, it may be the duty of this office as a matter of law to require these various agencies to restore these funds to the receivers of the various banks in which they were on deposit. Creditors of some of the banks are insisting upon such action being taken at this time. If such restoration must be made, then in most cases a substantial loss will be suffered by the depositing unit, which loss will in many instances ultimately fall upon the Treasury. *The situation is also urgent from the standpoint of the going national bank,* inasmuch as the various depositing units are now on notice as to the possible lack of power in the banks to give security for their deposits, with the result that *these banks are threatened with the withdrawal of hundreds of millions of dollars, which no doubt will be*

deposited in State banks which do under the State law possess power to give collateral security therefor. [Italics supplied.]

See also *O'Connor* v. *Rhodes*, 79 F. (2d) 146, 149 (App. D. C.); *McNair* v. *Knott*, *supra*.

This long-continued administrative construction is, we submit, controlling under the familiar canons of construction. Certainly, the statute here involved is not free from doubt. At least some of the instances of the taking of security were brought to the attention of Congress in reports. (See Appendix, pp. 35–37.) The National Banking Act has frequently been amended. The question is a practical one, dealing with practical affairs of government and the protection of government funds. In these circumstances the case is one for the application of the doctrine of *United States* v. *Midwest Oil Co.*, 236 U. S. 459. In that case the Court upheld the power of the President to withdraw public lands reported to contain valuable petroleum deposits, although there was no statutory authority for it. The Court said (pp. 469, 472, 473):

> We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's procla-

mation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government."

* * * * *

It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

See also *New Haven R. R.* v. *Interstate Commerce Commission*, 200 U. S. 361, 401–402; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 311–315.

4. The Deposits Consisted of Public Funds of the United States

In our view, then, the pledges can be defeated only if the deposits in question were not of governmental funds. But it seems clear that the funds deposited by petitioners in this case are as surely deposits of governmental funds, in which the United States is interested and which Congress intended to be safeguarded, as though they had been deposited as Treasury funds *eo nomine:*

(a) The organization, functions, and activities of the Inland Waterways Corporation (set forth at some length in its answer (R. 73–81)), may be summarized as follows: The Inland Waterways Corporation was created by the Act of June 3, 1924, c. 243, 43 Stat. 350 (49 U. S. C., Sec. 151ff.) for the purpose of carrying on the operations of the Government-owned inland, canal, and coastwise waterways system, until the system might be transferred to private operation, in order to promote and develop water transportation and facilities in connection with the commerce of the United States. There was transferred to the Corporation the transportation facilities and the floating equipment in the Mississippi River which had been purchased by the President through the Railroad Administration during the period of Federal control, and had been transferred to the Secretary of War for operation as the Inland and Coastwise Waterways service, Section 201 of the Transportation Act of 1920, c. 91,

41 Stat. 456, 458. The Denison Act of 1928 stated that the policy of Congress was to continue the transportation Service of the Corporation until: (1) navigable channels should be completed in the rivers where the Corporation operates, (2) adequate terminal facilities should be provided on such rivers, and (3) private persons should be engaging or ready to engage in common carrier service on the river. In that event the Secretary of War was to lease or sell to private persons or corporations the transportation facilities of the Corporation under terms approved by the President.

The Federal Control Act of March 21, 1918, had set up a revolving fund available for the purchase of the equipment. Under the Transportation Act of 1920, the operation of the Service by the Secretary of War was financed out of receipts from the Service placed in the general fund of the Service and disbursed as needed; an additional $1,225,000 was appropriated in 1921. Moneys made available to the Secretary of War were made available to the Corporation by Section 6 of the Act of its creation. Further moneys for the operation of the service were made available by Congress in the form of payments for the capital stock of the Corporation. The Corporation was endowed with the usual corporate powers and was incorporated solely by the Secretary of War, who was authorized to govern and direct the Corporation in its functions. The capital stock, all of which was subscribed for by the United States, was fixed at $5,000,000, to be

paid by the Secretary of War; the receipt of the Secretary for such payment was to be "evidence of the stock ownership of the United States" (Sec. 2, 49 U. S. C., Sec. 152). The Denison Act of May 29, 1928, c. 891, 45 Stat. 978, increased the capital stock of the Corporation to $15,000,000.

(b) A similar analysis of the United States Shipping Board Merchant Fleet Corporation (see answer, R. 35–38) discloses the following: Pursuant to authority contained in the Shipping Act of 1916, the Shipping Board caused the Corporation to be incorporated in 1917 under the laws of the District of Columbia, under the name "United States Shipping Board Emergency Fleet Corporation." The Board, on behalf of the United States, subscribed for all of the capital stock, in the sum of $50,000,000, which was paid to the Corporation from the Treasury of the United States, and was disbursed by the Corporation prior to 1918. All subsequent moneys received by the Corporation were received not as payment for the capital stock but from annual appropriations.

Section 4 of the Merchant Marine Act of 1920 provided that all vessels and property of whatever kind acquired by the Corporation be transferred to the Shipping Board. On April 16, 1923, the Corporation by formal deed conveyed to the United States all its personal property (R. 58). The Corporation thereafter performed functions delegated by the Shipping Board with respect to the sale and

operation of vessels owned by the United States and controlled by the Board, and with respect to the liquidation of the property transferred by the Corporation to the Board as aforesaid. From 1920 through 1932 Congress annually appropriated a huge sum to the Corporation in order to enable it to perform these functions.

The Corporation had two accounts in the Commercial National Bank. In its "Agent, Deposit Account" were deposited proceeds of government vessels, revenues derived from the operation of government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States which had come into the Corporation's hands as agent of the United States (R. 37–38). In its "Agent, Good Faith Deposit Account" were deposited funds delivered to the Corporation as agent of the United States as security for the performance of sales or purchase proposals. Checks on this account were drawn only to unsuccessful bidders for the return of their deposits, or to the Treasury when the deposit was forfeited or credited on the contract (R. 39).

(c) Both Corporations (which, for convenience, we shall discuss before treating the Canal Zone funds) perform governmental functions in the furtherance of the policy of Congress. They are both agencies of the United States, though clothed with corporate form so as to expedite the execution

of the functions. Indeed, the Inland Waterways Corporation is not even a typical corporate entity, but is rather another agent of the Secretary of War, who governs and directs its affairs and is only advised, and not controlled, by its board of directors. It seems plain that the funds controlled by these corporations are public funds of the United States. In its ordinary sense the term "public moneys" would appear to include all moneys equitably belonging to the United States, regardless of the source from which they may be derived. *Branch* v. *United States*, 100 U. S. 673.[22] Since the Federal Government is one of delegated power, its

[22] The term does not seem to be a word of art; nor to have received any comprehensive definition in any decision or statute. It has been held *inter alia* to include indemnity paid by foreign governments to the United States for claims on behalf of citizens (6 Ops. A. G. 590; cf. *Angarica* v. *Bayard*, 127 U. S. 251); moneys of the Home Owners' Loan Corporation (*Kay* v. *United States*, 303 U. S. 1, 8); funds held in trust for Indians (*Minis* v. *United States*, 15 Pet. 423, 448); processing taxes to be paid to the Philippine Islands (*Haskins Bros. & Co.* v. *Morgenthau*, 85 F. (2d) 677, 682 (App. D. C.), certiorari denied, 299 U. S. 588; *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 321); money recaptured from a railroad by order of the Interstate Commerce Commission (*Richmond, F. & P. R. Co.* v. *McCarl*, 62 F. (2d) 203, 206 (App. D. C.), certiorari denied, 288 U. S. 615); and postal receipts deposited at his own risk by a postmaster (*United States* v. *Porter*, 24 F. (2d) 139, 141 (D. Idaho)).

The only cases that we have found in which funds placed with a depositary were held not to be public moneys of the United States are those involving the deposit of funds in the registry of district courts. *Branch* v. *United States*, 100

every action within its constitutional power is a governmental action. *Graves* v. *O'Keefe*, 306 U. S. 466, 467. It follows that irrespective of the character (whether corporate or natural) of the agent through which the United States acts, the undertaking is governmental in character, and any funds which are applied or used in the furtherance of such an undertaking are public funds of the United States. See *Kiechhofer* v. *United States*, 19 App. D. C. 405, 411–412.[23]

U. S. 673; *Coudert, Administrator* v. *United States*, 175 U. S. 178; *Chatham & Phenix Nat. Bank* v. *Guaranty Trust Co.*, 256 Fed. 90 (C. C. A. 2d), certiorari denied, 250 U. S. 642.

[23] In discussing indemnity funds paid by a foreign government in satisfaction of international claims advanced by the United States on behalf of its nationals, the court stated (pp. 411–412):

"Plainly, therefore, this indemnity fund is public money of the United States in the broadest sense of the term. Indeed, it is not apparent how the United States could acquire or hold any money or property whatever except as public money or public property. For the United States exist only for public purposes; and whether they acquire money in the ordinary modes in which revenue is raised for governmental uses, or whether they receive it by way of donation, in trust to be applied to some great public purpose, such as the establishment and maintenance of the Smithsonian Institution, or whether the money has been demanded and recovered from foreign governments as compensation for injuries done to individual citizens and through such citizens to the national sovereignty, notwithstanding that in such case it has been received under moral, although perhaps not legal, liability to pay it out again to the individuals who have suffered such injuries, yet in all cases such moneys become the public money of the United States as soon

Theoretically, the Inland Waterways Corporation has legal title to the funds deposited by it: funds obtained from the subscription for its stock, or as a result of its activities in connection with the property which has been transferred to it. But, although the legal title may be in this Corporation, this Court recognizes that "in substance the * * * [funds are] the property of the United States." *U. S. Grain Corp.* v. *Phillips*, 261 U. S. 106, 113. See *Clallam County* v. *United States*, 263 U. S. 341; *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462; *King County, Wash.* v. *United States Ship. Board E. F. Corp.*, 282 Fed. 950, 953 (C. C. A. 9th).[24] This Court has, too, empha-

as they are received by any of its agents or by any department of the Government, and they remain such as long as they are held by it, or by any such department or agency, or as long as they remain under control of such department or agency."

[24] The court, in holding that property of the Fleet Corporation was exempted from local taxation, said:

"* * * But here, admittedly, the property is not only held by a governmental agency, but was acquired with public funds, and was to be used exclusively for public purposes. To hold that it lost its public character, because the government chose to have the legal title taken in the name of a corporation, which it brought into existence and completely controls for its own convenience, and the entire capital stock of which it owns, would be to sacrifice substance to form. * * *

"* * * Clearly, in the matter of expending this public money, under the direction of Congress and the President, in the purchase of property for governmental purposes, and in taking and holding the legal title thereto, the corporation was acting as a naked trustee, and the entire beneficial interest was in the government. * * *"

sized that any shrinkage or loss of such funds is, in effect, a loss of public moneys of the United States, in the sense that additional appropriations from the Treasury will be necessary to carry out the governmental functions entrusted to such agencies, or that the return to the United States derived from the earnings of such corporations will *pro tanto* be diminished. *Kay* v. *United States*, 303 U. S. 1, 8; *United States* v. *Walter*, 263 U. S. 15, 17–18. The interest of the United States in the United States Shipping Board Merchant Fleet Corporation has already been specifically recognized by this Court. In *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, this Court said (pp. 422–423):

> First. It is argued that the government rate should be denied because the Fleet Corporation is a private corporation. In form, it is such. But all of its $50,000,000 capital stock was subscribed and paid for by the Shipping Board on behalf of the United States. All has been so held by it ever since. The United States alone has had a financial interest in its capital stock. The United States alone has contributed the additional money needed from time to time for the conduct of its business. The Fleet Corporation has, of course, received from others moneys in payment for property sold, as charter hire, for shipping services, or in settlement of claims. But, as the business of the Fleet Corporation has been conducted continu-

> ously at a large loss, the sums so received did not supply capital. They served merely to reduce, to that extent, the amount of the deficit being incurred and, hence, the amount of the additional money which the United States was required to contribute. Payment by the Fleet Corporation of the commercial rate for messages would necessarily increase the charges upon the public treasury to the same extent, and in the same manner, as would the charge of the commercial rate in respect to the business done for the United States directly by the Shipping Board or that done for it by some other department of the Government. * * *

See also *United States* v. *Walter*, 263 U. S. 15, 17–18; *Russell Wheel & Foundry Co.* v. *United States*, 31 F. (2d) 826, 828 (C. C. A., 6th); *United States* v. *Czarnikow-Rionda Co.*, 40 F. (2d) 214, 215 (C. C. A., 2d); *Crane* v. *United States*, 73 C. Cls. 677, certiorari denied, 287 U. S. 601.

The good-faith deposits of the Fleet Corporation are likewise public moneys deposited with an agent of the United States as a condition precedent to the purchase of property of the United States. The moneys, which are applied toward the purchase price if the sale be consummated, and if not are returned to the purchaser, are public moneys of the United States while in the custody of one of its agents. *Smith* v. *United States*, 170 U. S. 372, 379.

Indeed, the court below agreed that the two deposit accounts in the name of the Merchant Fleet

Corporation consisted of money of the United States (R. 109). This was apparently also admitted by the bank (R. 68; see *supra*, note 4).

The public character of the funds involved in this case is in no way negated by the consideration that the moneys were not required to be covered into the Treasury, and were not under the general control of the Secretary of the Treasury.[25] The Federal Government has employed within the last generation many corporations and independent agents to carry out functions essentially governmental in character,[26] in order that these agencies might utilize commercial methods free of the restrictions characterizing ordinary government enterprises, and free of "accountability to the Treasury," *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 8. Each corporation, therefore, was permitted to deposit the moneys entrusted to it in its checking account in a commercial bank.[27] Yet the funds

[25] We shall discuss below (pp. 63–70) the possibility that the deposits in respondent banks were illegal.

[26] *Federal Corporations and Corporate Agencies*, 16 Harvard Business Review, 436; *McDiarmid*, Government Corporations and Federal Funds, 31 American Political Science Review, 1095.

[27] The matter is not so clear as to the Merchant Fleet Corporation. It received moneys from the sale of vessels owned by the United States and under the existing statutes should have covered these moneys into the Treasury or some public depositary. R. S. Secs. 3617, 3618, 3621; 31 U. S. C. secs. 484, 487, 495. However, the Appropriation Acts for 1929 and subsequent years, by appropriating to the corporation the interest earned on its funds would seem to constitute a validation of the deposit. See discussion *infra*, pp. 65–69.

handled by these agencies and instrumentalities are none the less public funds, and they have an implied duty to keep such moneys safely.[28]

(d) Similar conclusions obtain with respect to the Canal Zone deposits. The postal money order and deposit money order funds are clearly funds derived from and to be used in the exercise of a public, governmental function. Such funds derived from the continental postal service are undoubtedly public funds. See *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S., at 257, note 11; *United States* v. *Porter*, 24 F. (2d) 139, 141 (D. Idaho); *Woodruff* v. *United States*, 58 Fed. 766 (C. C. D. Kansas). The funds are still public funds of the United States, the preservation of which is important to the United States, though their origin in the Canal Zone takes them out of the ordinary Treasury custody and renders them, instead, subject to the control of the Secretary of War and other officials having administrative functions in the Canal Zone.[29]

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[28] Compare *Kay* v. *United States*, 303 U. S. 1, 8; *United States* v. *Kapp*, 302 U. S. 214, 217–218; *Langer* v. *United States*, 76 F. (2d) 817, 824–825 (C. C. A. 8th); *Madden* v. *United States*, 80 F. (2d) 672, 674 (C. C. A. 1st); *United States* v. *Harding*, 81 F. (2d) 563 (App. D. C.).

[29] The theory with respect to the treatment of these funds is set out in Brief for the Petitioners, No. 5, this Term, note 12, pp. 23–24.

In any event, the deposit of the funds in respondent banks has been validated by the Congressional disposition of the interest earned on the deposits. Act of August 21, 1916, c. 371, 39 Stat. 528.

5. The Secretary of the Treasury Has Specifically Approved the Pledge to Secure the Canal Zone Deposits

If the Court should decide that the validity of a pledge to secure deposits of federal governmental funds is conditioned upon personal participation by the Secretary of the Treasury in the taking of the pledge, then we submit that the present case, at least as to the Canal Zone funds, involves such an approval of the Secretary of the Treasury of the making of the deposit and the taking of security as to indicate a substantial compliance with R. S. Sec. 5153.

The Canal Zone specifically pleaded in its answer (R. 85, No. 6)—

> that the action of the Secretary of War and his subordinates in negotiating for the giving of security to safeguard the deposits and of entering into said contracts was the subject of correspondence between both the Secretary of War and The Panama Canal, and the Treasury Department, and was approved by the Secretary of the Treasury, and the entering into of the said contract of May 11, 1910, was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury.

This correspondence is reprinted (Appendix, pp. 46–58), and may be summarized briefly as follows:

The Secretary of War approved the suggestion of placing the Canal Zone funds on deposit in a

bank. Thereafter, the matter was taken up with the Treasury Department, which was asked what bonds would be considered satisfactory to secure the deposit. The Acting Secretary of the Treasury on April 21, 1910, advised what kind of bonds would be satisfactory security; and that the security should be kept in the safe of the Isthmian Canal Commission at Washington.

In response to a letter of the Secretary of War dated April 23, 1910, Secretary of the Treasury McVeagh replied that he would consider a deposit with either the Commercial National Bank or the Riggs National Bank satisfactory if secured by described bonds.

The contract of May 11, 1910, with the Commercial National Bank (R. 17–21) was entered into as a renewal of the contract of January 19, 1909.

On July 25, 1914, the Comptroller of the Currency wrote to the Secretary of the Treasury, in answer to the latter's memorandum, that the Commercial National Bank, the Continental Trust Co., and the District National Bank would be pleased to receive additional Canal Zone deposits and would provide securities to protect them. Secretary McAdoo, transmitting this memorandum to the Secretary of War, asked to be advised when the Secretary of War had taken action in the matter. The Secretary of War then informed the Secretary of the Treasury that it had been decided to make the new

deposit with the District National Bank of Washington.[30]

It may be suggested by the respondent that the tenor of these letters indicates that the Secretary of the Treasury, in his approvals and correspondence, was proceeding upon the assumption of a power in the bank, rather than upon a deliberate desire to invoke and make applicable the provisions of Section 5153 of the Revised Statutes. Yet we submit that his actions constitute a substantial compliance with that section, and that this Court should enforce the policy of the section to secure these accounts.

The Canal Zone moneys were public moneys within the meaning of this section. The allegation of petitioners in their answer (R. 90) that the funds are not public funds or part of the revenue of the United States subject to the control of the Secretary of the Treasury, means merely that the moneys are not revenues subject to the control of the Secretary of the Treasury. The funds would have had to be covered into the Treasury except upon the theory that the general federal statutes were not applicable to the Canal Zone. 11 C. D. 36. Even so, the statutes of Congress have made,

[30] Thereupon a contract dated August 18, 1914, was entered into with the District National Bank for a deposit of Canal Zone funds and the pledge of security by that bank to safeguard thedeposit. That transaction is involved in *Harry H. Woodring, Secretary of War et al.* v. *Wardell, Receiver*, No. 5, present Term.

and do make, provision for the Canal Zone postal moneys, appropriating them to the Canal Zone postal service.[31]

That the deposits were not made in the name of the Treasurer, or Secretary of the Treasury, is not of any significance. We are advised that the Secretary of the Treasury has exacted security to protect some Tennessee Valley Authority checking accounts, and that in the days when disbursing officials of the various departments had their own official checking accounts, the Secretary of the Treasury exacted security to safeguard the deposits. In *Branch* v. *United States*, 12 C. Cls. 281, 289, affirmed, 100 U. S. 673, the court noted that the Government takes security for its own public money on deposit in national banks, not only the funds under the control of the Treasurer but also "other Government money deposited there to the credit of other public officers charged with its receipt or expenditure," considered as public money.

The Secretary of the Treasury gave his approval to both of the Canal Zone deposits involved in these cases. He determined what banks would be willing to give security, and what kind of security would be safe, the same being the security specified for general deposits of public moneys. In substance, he determined the type of security obtained

[31] E. g., Section 3 of the Sundry Civil Appropriations Act of May 27, 1908, c. 200, 35 Stat. 386; Act of March 4, 1909, c. 299, 35 Stat. 945, 1026; Act of August 1, 1914, c. 223, 38 Stat. 674; Act of February 16, 1933, Sec. 1, c. 89, 47 Stat. 812. See discussion in petitioners' brief in No. 5, pp. 23–24.

as well as the identity of the depositary. The Secretary of War merely chose among the banks approved by the Secretary of the Treasury, and his selection was in turn made known to and approved by the Secretary of the Treasury.[32] We submit that even if Section 5153 of the Revised Statutes is limited to personal participation by the Secretary of the Treasury in the obtaining of the pledge, the circumstances of this case show substantial compliance with that section with respect to the Canal Zone deposits.

II

If the Deposits in the Respondent Banks by the Corporate Petitioners Were Invalid, the Receipt of the Deposits Gave Rise to a Trust Ex Maleficio Which Requires Reversal of the Judgment

It was argued below, by the Inland Waterways Corporation and the Merchant Fleet Corporation,

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[32] This suffices to show substantial compliance with the requirement of a designation by the Secretary of the Treasury.

In any event, it may be noted that both banks involved had been designated as regular or general depositaries of public moneys by the Secretary of the Treasury. This is indicated by the Annual Reports of the Secretary of the Treasury for 1910 to 1920. See e. g., Report of 1910, p. 221; Report for 1913, p. 278; Report for 1917, p. 431. On March 4, 1920, all the Treasurer's balances with all regular depositaries in the District of Columbia were withdrawn and all regular designations were terminated.

The subsequent discontinuance of regular or general depositaries of public funds in the District of Columbia would presumably not render automatically invalid contracts of security validly entered into.

first, that the pledge was valid, and, in the alternative, that if the pledge were invalid the original deposit in the bank was illegal; so that the funds deposited constituted a trust *ex maleficio*, and came into the hands of the receiver of the bank impressed with a trust; and that the delivery of the bonds or their proceeds constituted not an invalid preference but a discharge of petitioners' claim arising out of the trusts. If the deposits were illegal, we think the conclusion logically follows. We do not think, however, that the deposits were illegal. Because of the importance to the fiscal practices of the Government, and lest there be doubt as to their nature, we shall set forth our analysis of the problem.

A. THE VALIDITY *vel non* OF THE DEPOSITS

1. Inland Waterways Corporation

Any invalidity of the deposit must lie in R. S., Sec. 5497 (18 U. S. C., Sec. 182), which provides:

> Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose

> not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

The question turns on the meaning of this statute in making it unlawful for one not an "authorized depositary of public moneys" to receive from any agent of the United States "any public money on deposit." Unquestionably, the Inland Waterways Corporation is an agent of the United States, and its funds are public funds of the United States. See discussion, *supra*, pp. 49–57. The court below held that this statute did not have the effect of punishing the making of deposits permitted by law, that government corporations were created in order to obtain the advantages of commercial organization in governmental functions, and that their funds under this section were considered moneys of the corporation which could be deposited wherever general corporate practice dictated, without running afoul of R. S., sec. 5497.

The result reached below reflects the uniform understanding of all governmental corporations, and is believed to be sound beyond question. For purposes of the technical statutes relating to the manner of deposit of moneys, and covering into the

Treasury, the corporate form is sufficient to require that the moneys be treated *pro tanto* as that of the corporation and not of the United States as sole stockholder. See 22 C. D. 137 (Alaska Northern Ry.). Compare, also, 37 Ops. A. G. 1 (R. F. C.). This result also is implicit in the opinion in *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, finding the governmental corporations free of accountability to the Treasury.[33]

2. *Merchant Fleet Corporation*

As to this Corporation, a different picture is presented. The moneys deposited by it were not even theoretically moneys of the Corporation (R. 36–38). We have already seen (*supra*, pp. 49–50), that the money received from the Treasury for its capital stock, which may be viewed as money of the Corporation, was disbursed by it prior to 1918, and that all subsequent moneys were received from annual appropriations; that the Merchant Marine Act, 1920, transferred to the Shipping Board all the property of the Corporation and that in 1923 the Corporation formally conveyed its personal property (R. 58); that the moneys deposited by the Corporation in its "Agent, Deposit Account" were

[33] In some cases, however, Congress has prescribed that moneys which did not have to be covered into the Treasury be kept with the designated depositaries. *Cf.* Section 10 of the Transportation Act of 1920, with respect to the excessive profits paid in as a revolving fund to the Interstate Commerce Commission. See 33 Ops. A. G. 316.

proceeds of the sale of Government vessels, revenues derived from the operation of Government vessels, rentals from real estate owned by the United States, bank interest on public funds, and miscellaneous revenues of the United States which had come into petitioner's hands as agent.

The funds are of a type which the statutes of the United States require to be covered into the Treasury. The funds are clearly embraced by R. S., Sec. 3617 (31 U. S. C., Sec. 484), Appendix, p. 2, which provides that "all moneys received from whatever source for the use of the United States * * * shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable." These funds, not derived from Corporation property but from Government property, were clearly received for "the use of the United States," and were received by an "agent," i. e., a corporate agent.

The proceeds of vessels and other property in liquidation are also specifically covered by R. S., Sec. 3618 (31 U. S. C. Sec. 487), Appendix, pp. 2–3, which provides that all proceeds of sales of public property of any kind, with exceptions not material, shall be covered into the Treasury as miscellaneous receipts. R. S., Sec. 3621, as amended (31 U. S. C. Sec. 495), Appendix, p. 3, provides that "Every person who shall have moneys of the United States in his hands or possession * * * shall pay the same to the Treasurer, or some public

depositary of the United States, without delay, and in all cases, within thirty days of their receipt." See also R. S., Sec. 3639, 31 U. S. C. Sec. 521, requiring all public officers "to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or otherwise at any time placed in their possession and custody".[34] These considerations demonstrate the invalidity of the deposit in the Commercial National Bank, located in Washington, D. C., and not a designated depositary, of public money required by law expeditiously to be covered into the Treasury.[35] These statutes provide no justification for the Corporation's practice of depositing the moneys in a Washington bank and then transferring them, after a while or "from time to time," to the Treasury (R. 35–39).

The conclusion that the funds held by the Merchant Fleet Corporation were required to be covered into the Treasury was entertained by the Comptroller General and his statutory predeces-

[34] The deposit account was opened Dec. 1, 1921 (R. 30). The Commercial Bank had previously ceased to be a general depositary, see *supra*, p. 62, note 32.

[35] The earnest money deposited by bidders, and kept by the Corporation in the Good Faith Deposit Account, though apparently not moneys required to be covered into the Treasury as "moneys received * * * for the use of the United States," within R. S. Sec. 3617, would seem to be included within the prohibition of R. S. Sec. 3639 against depositing in banks.

sors.[36] His views were forcefully stated in a communication dated June 16, 1931 (referred to at R. 47), Appendix, pp. 28–29, asserting that the moneys of the type which composed the deposit in this case were required to be covered into the Treasury. The same conclusion was again asserted with even more emphasis and finality in an opinion dated February 8, 1932, Appendix, pp. 29–35.[37]

However, this illegal deposit seems to have been ratified by Congress. In the Appropriation Acts for 1929 and subsequent years,[38] a provision allocated to the Merchant Fleet Corporation the interest on its "funds" (interest which the Comptroller General had ruled must be covered into the Treasury, see note 36). Congress was aware, as evi-

[36] 27 C. D. 311 (1920) held the statutes relating to public moneys applicable to appropriations made by Congress to Emergency Fleet Corporation, and finding no authority for the Corporation to place the use and custody of its moneys in another, by advancing funds as working capital for a marine insurance business; 5 C. D. 1004 (1926) held the interest upon appropriated moneys kept in banks to be moneys "received for the use of the United States" and therefore required to be covered into the Treasury; and querying the practice of maintaining such deposit accounts.

[37] We are informed by employees of the Maritime Commission that in 1933 the moneys were deposited in Fleet Corporation symbol accounts in the Treasury (not merely deposited with the Treasurer).

[38] Act of May 16, 1928, c. 580, 45 Stat. 573, 585; Act of February 20, 1929, c. 270, 45 Stat. 1230, 1244; Act of April 19, 1930, c. 201, 46 Stat. 229, 244; Act of February 23, 1931, c. 281, 46 Stat. 1355, 1371; Act of June 30, 1932, c. 330, 47 Stat. 452, 468; Act of June 16, 1933, c. 101, 48 Stat. 283, 298.

denced by statements made in the course of debate, that the interest in question was interest earned on the Corporation's deposits in a hundred-odd banks. See 69 Cong. Rec. 1959. The provision in question was prompted by the desire of the Shipping Board not to have to account monthly for its interest, which in many instances would require computations of conversion from foreign exchange. At the hearings the Board divulged that the Corporation had 178 domestic accounts in 81 domestic banks, and foreign accounts in 43 foreign banks. Hearings before the Subcommittee of House Committee on Appropriations on Independent Offices Appropriation Bill, 1929, p. 772.

In his opinion of February 8, 1932, the Comptroller General stated that the provisions appropriating interest merely disposed of the proceeds resulting from a prior illegal practice. However, this was not a single statute but a provision continued in several appropriation Acts. It was inaugurated upon the basis of Congressional knowledge of the existence of a large number of bank accounts. We think that these appropriation Acts clearly constitute a ratification of the deposits. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297; *Mason Co.* v. *Tax Commission*, 302 U. S. 186.

3. *The Canal Zone*

The answer of the Canal Zone did not allege that the bank held the deposits as trustee *ex maleficio*,

and the issue with respect to these deposits was raised in neither court below. In addition, the deposits have plainly been ratified by Congress, as is shown in detail in our brief in *Woodring* v. *Wardell*, No. 5, this Term.

B. IF THE DEPOSITS WERE ILLEGAL, THE BANK HELD THE FUNDS DEPOSITED BY THE PETITIONERS AS TRUSTEE EX MALEFICIO AND THE RECEIVER TOOK THE ASSETS OF THE BANK SUBJECT TO THIS TRUST

1. We think, therefore, that none of the deposits were illegal. If, however, they were illegal, the bank acquired no title thereto. The law is well settled that a bank becomes a trustee *ex maleficio* where a deposit is not merely unauthorized but is forbidden by statute.[39] Cf. *Commercial Bank of Pa.* v. *Armstrong*, 148 U. S. 50, 59.

It is also settled that where the receiver of a national bank takes over the assets of that bank, he takes them subject to any lien or trust then exist-

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[39] *San Diego County* v. *California National Bank*, 52 Fed. 59 (C. C. Cal.); *Merchants' National Bank* v. *School District No. 8*, 94 Fed 705 (C. C. A. 9th); *Board of Commissioners* v. *Strawn*, 157 Fed. 49 (C. C. A. 6th); *Empire State Surety Co.* v. *Carroll County*, 194 Fed. 593, 603 (C. C. A. 8th); *City of Centralia* v. *United States National Bank*, 221 Fed. 755 (D. C., Wash.); *Allen* v. *United States*, 285 Fed. 678 (C. C. A. 1st); *American Surety Co.* v. *Jackson*, 24 F. (2d) 768, 769 (C. C. A. 9th); *Fiman* v. *State of South Dakota*, 29 F. (2d) 776 (C. C. A. 8th); *First National Bank of Forsyth, Mont.* v. *Fidelity & Deposit Co.*, 48 F. (2d) 585, 587 (C. C. A. 9th); *American Surety Co.* v. *Waggoner Nat. Bus.*, 83 F. (2d) 99, 101 (C. C. A. 5th).

ing. *Scott* v. *Armstrong*, 146 U. S. 499, 507, 510; *Early* v. *City of Helena, Ark.*, 87 F. (2d) 831, 832 (C. C. A. 8th); *United States* v. *National Bank*, 73 Fed. 379, 381 (C. C. W. D. N. C.). It is only necessary that the trust be established and that the fund be traced into the hands of the receiver. A presumption exists that, where subsequent to the creation of a trust the cash deposits in a bank never fell below the amount of the trust and where the assets of the bank are augmented by the trust fund, the trust is adequately traced into the hands of the receiver. *Cook* v. *Elliott*, 73 F. (2d) 916 (C. C. A. 4th); *Tucker* v. *Newcomb*, 67 F. (2d) 177, 179 (C. C. A. 4th); *Merchants' National Bank* v. *School District No. 8; Board of Commissioners* v. *Strawn; Allen* v. *United States; American Surety Co.* v. *Jackson; First National Bank of Forsyth, Mont.* v. *Fidelity & Deposit Co.; Fiman* v. *State of South Dakota;* all *supra* note 39.

Owing to the fact that the instant case was disposed of on the pleadings, the petitioners have had no opportunity to establish that the deposits augmented the assets of the bank, and that sufficient cash effects came into the hands of the receiver to satisfy the trusts. That opportunity, if the deposits are held illegal, should be afforded them. *Cook* v. *Elliott, supra*, 918; *Schumacher* v. *Harriett*, 52 F. (2d) 817, 820 (C. C. A. 4th). We respectfully submit, therefore, that if the deposits were illegal, the receiver took the assets of the bank sub-

ject to a trust in favor of the petitioners or the United States.

2. Whether or not the receiver now has funds sufficient to satisfy the trust, a fact not disclosed by the record, is immaterial if funds sufficient to satisfy the trust came into his hands when the bank closed. The turning over to each petitioner of amounts obtained upon the sale of the pledged securities, or of the securities themselves, by the receiver or his predecessor, with the consent of the Comptroller of the Currency, may be regarded as a satisfaction by the receiver of the trusteeship *ex maleficio*. To compass such a result would be most equitable since otherwise the petitioners would be deprived of their rightful property, and the general creditors would receive that to which they had no right. *Standard Oil Co. of Ky.* v. *Hawkins*, 74 Fed. 395, 402 (C. C. A. 7th). In substance the result is the same as if the receiver himself had sold securities in his possession and with the cash proceeds had satisfied a charge upon certain funds held by him for administration. Or, viewed from another aspect, the mutual agreement between the parties substituted the pledged bonds for the unextinguished trust, and thereby discharged the mutual claims of one against the other. *Cook* v. *Tullis*, 18 Wall. 332.

Furthermore, as to trust funds once under his control and now gone, the receiver would seem to be guilty of conversion, notwithstanding the fact

that the funds may have been paid as dividends to general creditors. Accordingly, whether he maintains the instant action in his personal capacity or in his capacity as representative of the creditors, he is subject to the setoff arising out of the conversion.[40] Nor may the creditors acting through him be unjustly enriched at the expense of the public by being allowed to benefit by his conversion of the trust fund. Recovery may not be had by them until they have restored the dividends which they have received as the result of his conversion.

III

Specifically, the Pledge of Assets to Secure the Canal Zone Funds Was Legal and, in Any Event, the United States Is a Necessary Party to the Suit As to Those Funds

The Canal Zone funds are identical in character with those involved in *Woodring* v. *Wardell*, No. 5, this Term. Independently of the general considerations here urged, and for the reasons set forth

[40] If this Court should extend the doctrine of the *Pottorff* and *Sneeden* cases, an anomalous condition will arise out of the misapprehension of law which existed among government officials and officials of national banks who believed that national banks possessed the power to pledge assets to secure deposits of governmental moneys. Should this Court hold this administrative interpretation incorrect, it follows that although the receiver did not know that he took possession of a trust fund, nevertheless his ignorance of his legal position would not excuse him from the conversion of the trust *res* coming into his hands.

in Point I of the petitioners' brief in that case, we submit that the pledge to secure these deposits was valid.

The question whether the United States is a necessary party to this suit, in so far as it relates to Canal Zone money-order funds, is discussed in the brief of the petitioners in *Woodring* v. *Wardell*, No. 5, this Term, and we respectfully submit that, for the reasons set out in Point II of that brief, this suit must be dismissed as to petitioners Woodring and Smith.

While the question of whether the United States is a necessary party, in respect of the claims against the Inland Waterways and the Fleet Corporation, was preserved in the petition in the instant case, we do not urge that question here.

CONCLUSION

It is respectfully submitted that the decision of the court below is incorrect and should be reversed.

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